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TO:	REPORT ON THE FILING OR DETERMINATION OF AN ACTION REGARDING A PATENT OR TRADEMARK
Commissioner of Patents and Trademarks Washington, DC 20231 U.S. PATENT & TRADEMARK OFFICE	

In Compliance with 35 § 290 and/or 15 U.S.C. § 1116 you are hereby advised that a court action has been filed in the U.S. District Court Central District of California on the following G Patents or G Trademarks:

DOCKET NO.	DATE FILED	U.S. DISTRICT COURT
CV05-3228 DT	4/29/05	Central District of California
PLAINTIFF JAKKS Pacific, Inc., and EdiZone, LC		DEFENDANT Imperial Toy Corporation, and Ja-Ru, Inc.

2005 APR 29 PM 12:00
FILED
CLERK, U.S. DISTRICT COURT
CENTRAL DIST. OF CALIF.
LOS ANGELES
BY

PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK
1 6026527	2/22/00	EdiZone, LC, and JAKKS Pacific, Inc. as exclusive licensee
2 5749111	5/12/98	EdiZone, LC, and JAKKS Pacific, Inc. as exclusive licensee
3		
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In the above—entitled case, the following patent(s) have been included:

DATE INCLUDED	INCLUDED BY G Amendment G Answer G Cross Bill G Other Pleading	
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK
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DOCKETED ON CM
AUG 6 2007
BY 021

In the above—entitled case, the following decision has been rendered or judgement issued:

DECISION/JUDGEMENT
Order-

CLERK	(BY) DEPUTY CLERK	DATE
SHERRI R. CARTER		AUG - 6 2007

DOCKETED ON CM
MAY - 5 2005
BY 001

Copy 1—Upon initiation of action, mail this copy to Commissioner Copy 3—Upon termination of action, mail this copy to Commissioner
Copy 2—Upon filing document adding patent(s), mail this copy to Commissioner Copy 4—Case file copy

of the '249 patent is that the plasticizer to polymer ratio is 1.5:1, (Pl. Ex. 35, '249 patent at 5:11-26), certainly lower than the ratio in the preferred embodiments but higher than the 1:1 ratio proposed by Imperial. Thus, all of the described permutations of material – both preferred and non-preferred – have ratios of plasticizer to polymer above 1:1.

The extrinsic evidence supports Imperial's claim that a ratio of less than 1:1 of plasticizer would create a gel that was not within the invention. Imperial first points to deposition testimony by Pearce in which Pearce indicated that a ratio of less than 1:1 of mineral oil (plasticizer) to polymer would not form a gelatinous elastomer (the term used in the claims of the '662 patent). In a deposition taken in this case, Pearce adopted as accurate[4] this statement that he had made in prior deposition testimony:

> Q: To your knowledge you were the first to mix together mineral oil and Septon 4055?
>
> A: No, I'm not. To mix mineral oil and Septon 4055 with a small portion of mineral oil; for example, a ratio of less than one part mineral oil to one part Septon 4055 or any polymer was a reasonably common practice, not to form what is known as a gelatinous elastomer but to form a more flexible elastomer

[4] Jakks' objection that Pearce's testimony should not be considered because only this excerpt of the prior deposition was introduced is not meritorious. The testimony was explicitly adopted by Pearce during a deposition for which a certified transcript was submitted into evidence.

material. So I would imagine that other parties—I know one party before me that did do that.

(Def. Ex. 6 at 76-77.) While not the most artfully constructed statement, the Court reads the statement to say that a mixture of plasticizer (oil) and polymer in less than a 1:1 ratio would not form what the patents call a "gelatinous elastomer" or "gel cushioning media" (again, both parties seem to accept that the patents all refer to the same material, despite the slightly different nomenclature).

Imperial also points to Jakks' interrogatory response that defined "gel cushioning media" as a "gelatinous elastomer" and "highly plasticized" compound. (Def. Ex. 22, Pl. Resp. to Int. 19 and 21.) Imperial construes "highly plasticized" to necessarily mean at least 50% plasticizer. The Court does not think it fair to assume that "highly" necessarily means more than 50% – rather, that would depend on the context. The high concentration of plasticizer in the gels discussed in the patents (generally, around 3:1) provides some context for the assumption that "highly plasticized" means at least a 1:1 ratio. More convincing support for this definition of "highly plasticized" comes from John Chen ("Chen"), the inventor of one of the preferred gels in the '111 patent and the person whose gel Pearce was working with when he invented the cushion that became the '111 patent. In a deposition, Chen stated that a gel with a ratio of plasticizer to polymer of less than 1:1 would not be "highly" plasticized. (Def. Ex. 4 at 42.)

In contrast, Jakks argues that Imperial's definition is one made up for litigation purposes and that the proper definition is found in the Encyclopedia of Polymer Science and Engineering, which was incorporated by reference in the '111 patent, (Pl. Ex. 31, '111 patent

at 20:41-47): "A gel is a cross-linked polymer network swollen in a liquid medium." (Pl. Ex. 2.) The Court agrees with Imperial that such a general definition cannot be applied in the face of substantial intrinsic and extrinsic evidence that the material to be used in the patented inventions had to be something with particular characteristics, such as enough flexibility that columns would buckle or at least that the material would demonstrate a fluid-like deformation under load. The Court's definition does not pronounce that only materials meeting the 1:1 ratio requirement are properly considered a "gel" – the only thing Jakks' proposed definition purports to define. Instead, the Court's definition narrows the field of gels that are properly considered within the purview of the patents. The Court has no duty to accept extrinsic evidence that does not comport with the intrinsic evidence. Moreover, the fact that the source was incorporated by reference in the specification must be discounted by the fact that its incorporation is with respect to polymers in particular, not with respect to the combination of polymers and plasticizers.

Additionally, Jakks points out that in deposition testimony for this case, Pearce testified that "[t]here is no solid, firm, black and white dividing line between a gel and a non-gel elastomer." (Pl. Ex. 30, Pierce Dep. at 78:21-79:2.) While undoubtedly true, the bulk of the evidence presented indicates those skilled in the art would not consider a material with a less than 1:1 ratio of plasticizer to polymer to be soft enough to fit within the inventions.

The Court finds that "gel cushioning media" and "gelatinous elastomer material" properly construed mean a material that displays a fluid-like deformation under load, consisting of at least one part

plasticizer (e.g., mineral oil) to one part polymer by weight, as Imperial suggested. This definition imports the description given by Pearce, the description inherent in the claim requirements that the columns can buckle (because the gel must be flexible enough that the columns can buckle),[5] all of the examples given in the specifications (even the non-preferred ones), and the deposition testimony by Chen. The only evidence that is not incorporated in this definition is Pearce's statement that a firm line cannot be drawn between materials that do qualify as gel elastomers and those that do not, as well as the very general dictionary definition. The Court is sensitive to the difficulty of drawing a quantitative line in the claim construction when no quantitative line was specifically drawn in the patents. However, the Court does not view Jakks' proposed definition as adequate and views the 1:1 ratio as conservative with respect to the specifications and as supported by deposition testimony of both Pearce and Chen.

Under the proposed formulation of the definition of "gel cushioning media" and "gelatinous elastomer material," Imperial's balls do not infringe any of the patents. Imperial's toys have 37.4% plasticizer to 62.5% co-polymer, with .1% colorant. (Leung Decl. ¶ 4.) Because Imperial's toys do not meet the requirement of at least a 1:1 ratio of plasticizer to polymer, the Court need not address whether Imperial's toys have a fluid-like deformation under load. Thus, none of the patents are infringed by any of Imperial's toys.

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[5] In the '662 patent, the columns on the toys do not have to buckle. However, the material for the '662 patent and the '111 and '527 patents (in which the claims do require bucklability) is the same.

2. The '662 Patent

If the gelatinous material in the Imperial toys were found to be within the inventions, then examination of the specific claims of the '662 patent would demonstrate that none of Imperial's New Toys infringe.[6] The five parts of claim 1 of the '662 patent that Imperial uses to demonstrate that it is not infringing the '662 patent are construed and applied to Imperial's products seriatim. The third part of claim 1 analyzed below demonstrates that Imperial's toys do not infringe the '662 patent.

Claim 1, Issue 1. "A grippable cushion comprising a quantity of elastomeric polymer plasticized with a plasticizing agent to form a gelatinous elastomer material that is generally non-flowable at room temperatures." (Def. Ex. 3, '662 patent at 4:63-67.) Leaving aside the question of what a "gelatinous elastomer" comprises, the Court construes "grippable cushion" to be a term of art unrelated to whether the object functions as a cushion or pillow in the ordinary sense. Based on the specifications, the inventor intended "grippable cushion" to mean that the object has a pliability and resilience such that pressure on the object impacts the shape of the object. For example, the specification states: "An important physical structure provided by the grippable cushioning devices of the invention is relief . . . [and the device should] deflect or highly deflect under the force of contact with a user's body part." (Def. Ex. 3, '662 patent at 3:32-40.) It need not be an object that is designed specifically for gripping, however, such as a ball or other toy. Rather, the

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[6] The Original Balls were discontinued before the issuance of the '662 patent, so the only toys that can infringe the '662 patent are the New Toys.

specifications indicate that the invention can be used in shoes, cushions, shock absorption pads for sports or protecting delicate equipment, as well as in toys. (Id., '662 patent at 4:28-43.)

Imperial's toys are grippable cushions. The toys yield to pressure, making them easier to grasp.

Claim 1, Issue 2. "Said gelatinous elastomer material being configured into the shape of a grippable cushion; said grippable cushion having an outer periphery and an inner portion; said grippable cushion inner portion including said gelatinous elastomer material; said grippable cushion outer periphery being defined at least in part by said gelatinous elastomer material; said grippable cushion outer periphery being configured to enhance grippability by a human hand." (Id.,'662 patent at 5:1-11.)

The specifications make clear that a grippable cushion can have any number of shapes; the Court interprets this part of the claim to simply mean that the material is shaped.

The Court interprets the need for an outer periphery and inner portion to mean that the object cannot be paper-thin and flat. Because one of the embodiments illustrated in the specifications is a flying disk, the Court does not interpret the need for an outer periphery and inner portion to require a traditional core. For example, the Court construes the inner portion of the flying disk to be the middle of the disk. The outer periphery is commonly understood to be the edge or outline of the outside of the object. The Court understands the inner portion to be any part of the object inside the outer periphery. Both the inner portion and the outer periphery must have some amount of the gelatinous elastomer material but need not be entirely made of the gelatinous elastomer material. What is

considered the inner portion will vary depending on the shape of the object, but will be the material that is within the outer periphery. Thus, the inner portion of a ball would be the entire amount of material within the outline of the ball. The Court views the common interpretation of the outer periphery of a disc to be the circumference of the disk. Therefore, the inner portion of a flying disk would be that portion of the flying disk within the circumference (outer periphery) of the disk. The Court does not interpret the need for an outer periphery and inner portion to require that the periphery and inner portion be readily distinguishable from each other. The embodiments discussed in the specifications are, for the most part, solid gel – thus, the only dividing line between the outer periphery and the inner portion is that the inner portion is not the outline of the object.

Finally, the Court interprets the need for the outer periphery being configured to enhance grippability as a requirement that the outer periphery be designed in such a way that the object is easily grasped by a human hand. The Court recognizes that the human hand can grasp an infinite number of configurations, but the Court nevertheless does not construe this part of the claim as meaningless – for example, if the outer periphery included hard spikes, this would not be a configuration that enhanced grippability by a human hand.

Imperial argues that its toys with a hard plastic cylindrical core (the jump rope, tops, yo-yo and paddle ball handles) do not have an inner portion that includes gelatinous elastomer material. The Court views it as a close call but disagrees. There is no question that all of these toys' inner portions have something other than gelatinous elastomer material. However, the only requirement is that

the inner portion have *an amount* of gelatinous elastomer material. In all of these toys, the gelatinous elastomer extends slightly (some more than others) into the inner portion of the toy. The Court recognizes that it would be natural to view the gelatinous part of the jump rope handles as the outer portion and the hard core as the inner portion. However, the Court is mindful that the claim does not discuss an outer *portion* but an outer *periphery*. As discussed in the claim construction above, the periphery is commonly thought of as the edge or outline of an object. Thus, to the extent any thickness of that periphery extends the gelatinous material inward, the gelatinous material is within the inner portion. To find otherwise would put the Court in the position of making difficult determinations that are unsupported by the language of the patent. For example, if a ball has a hard plastic core and one-half inch of gel versus a hard plastic core and one-quarter inch of gel, would the former be considered to have a partially gelatinous inner portion but not the latter? Making distinctions such as these is wholly unsupported by the language of the patent. The paddle handle and jump rope handles clearly have a gelatinous inner portion. The top and the yo-yo also have a gelatinous inner portion, even though that inner portion largely consists of the gel beneath the protruding gelatinous ribs. The "ribs" have sufficient thickness that there is something more there besides an outer periphery, and that something more includes a gelatinous material.

Claim 1, Issue 3. "A plurality of elongate hollow columns at least some of said elongate hollow columns having a longitudinal axis, at least some of said elongate hollow columns' longitudinal axes being generally parallel to each other." (Def. Ex. 3, '662 patent at 5:12-

16.) "Plurality" means more than one. A "hollow column" is an empty space in the gel media that is characterized by its length rather than by its width. The requirement that a hollow column be "elongate" seems redundant because elongate would generally require length over width, which is already part of the "column" concept. Because the specifications include round objects, it would not make sense to construe the "elongate hollow column" as a requirement that the column run the length of the object (because a cylinder does not have a "length"). Thus, the Court construes "elongate hollow columns" to have the same meaning as "hollow columns."

Importantly, the Court agrees with Imperial's argument that the hollow columns must be fully enclosed in the gel cushioning media in order to be within the claim. The Court recognizes that "hollow" could commonly be understood simply to mean concave or "hollowed out" – that is, without a requirement that a wall surround the hollow on all sides. However, the Court is mindful of the elevation of intrinsic evidence over extrinsic evidence. Were the '662 patent an isolated patent, the Court might well find that a "hollow column" need not be fully enclosed in the gel media. However, the Court cannot read the '662 patent in a vacuum. Instead, it must consider the family of patents of which the '662 patent is a member – that is, the '111 and '527 patents – and the way that those other patents use the term "hollow column." The '662 patent is a continuation of the '111 and '527 patents. A term used in the '662 patent that is also used in the '111 and '527 patents should be given the same construction. See Goldenberg v. Cytogen, Inc., 373 F.3d 1158, 1167-68 (Fed. Cir. 2004) (when patents have familial relationship, under certain circumstances claim construction of one patent may be affected by related patents).

To begin with, all of the depicted columns in all of the patents are fully enclosed in the media. Also, the depicted football in the '662 patent references "holes or columns within its interior," which could be construed as indicating that the holes or columns are fully enclosed by the media. (Def. Ex. 3, '662 patent at 2:45.) Without more, the Court would not be willing to read a limitation requiring full enclosure of the hollow columns in gel media into the claims from the specifications. After all, the terms are not scientific ones and therefore it is not clear that the inventor intended to be his own lexicographer with respect to the term. Additionally, the football description says that the material "may include a plurality of holes or columns within its interior," not that it must. (Id. (emphasis added).) However, there is more.

The '111 and '527 patents give considerable attention to the bucklability of the hollow columns. For purposes of the claim construction, the Court focuses on the original patent, the '111 patent. It is the bucklability of the columns in the gel that provides the special distribution of weight of the cushioned object on the cushion. For example, the '111 patent states:

> It is an object of the invention to provide a cushion that eliminates pressure peaks on an object being cushioned. It is a feature of the invention, as mentioned above, that the invented cushion includes columns which buckle under protuberances on a cushioned object. As a result, the cushioned object is not exposed to pressure peaks.

(Def. Ex. 1, '111 patent at 5:17-22.) Claim 1 of the '111 patent requires "a plurality of hollow columns situated in said cushioning

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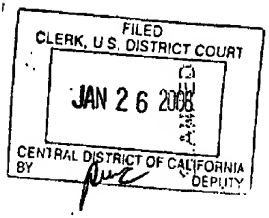

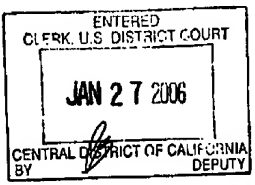

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAKKS PACIFIC, INC. and EdiZONE, LC, Plaintiffs, v. IMPERIAL TOY CORPORATION, Defendant.	CV 05-3228 SVW (CWx) ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [32]

I. SUMMARY

In this patent infringement case, toy maker Jakks Pacific, Inc. ("Jakks") and patent owner EdiZONE, LC allege that the toys of Imperial Toy Corporation ("Imperial") infringe three patents held by EdiZONE, LC and licensed by Jakks. Imperial now moves for summary judgment on either of two bases: (1) its products do not infringe the patents; or (2) the patents are invalid.

The Court GRANTS summary judgment to Imperial because Imperial's products do not infringe the patents.

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media" and that at least one of "said [hollow][7] column walls is capable of buckling beneath a protuberance that is located on a cushioned object." (Def. Ex. 1, '111 patent at 32:47-51, 62-64.) In order for a hollow column to be capable of buckling in a meaningful way – that is, in a way that fulfills the weight distribution and relief function that the column specifically and the invention generally is designed to fulfill – the columns would necessarily have to be fully enclosed in the gel media. Were the "hollow column" not fully enclosed, such that the "column" was on the periphery of the cushion and not fully enclosed, it is difficult to imagine how the column would provide that redistribution of weight that is critical to the design. Of course, the claim only requires *one* hollow column to be capable of buckling beneath a protuberance. One could argue that, therefore, columns without the buckling capacity/weight distribution function discussed above could also be considered "hollow columns," and thus an unenclosed hollow column could still be within the '111 patent. The Court rejects that reasoning. The '111 patent practically seethes with the importance of the columns to the weight distribution function, an essential aspect of the invention. Even if the columns are not buckling under a protuberance, they are providing weight distribution. The patent states:

> It is an object of the invention to provide a cushion that achieves near hydrostatic pressure distribution across the contact area of the object being cushioned. The compressability of the gel columns provides good overall cushioning, and the

[7] The reference to "said" column wall is clearly referring to the aforementioned "hollow column.

buckling of columns beneath the most protruding points relieves pressure at the points where it is highest in prior art foam or solid gel cushions.

(Def. Ex. 1 at 7:31-37.) Thus, at least one column must be located so that the protuberance of the cushioned object for which the cushion is designed (e.g., a rear end on a human) will come in contact with the column and buckle. But the other hollow columns (and there must be a "plurality"), even if they are not buckling, are compressing in a way that distributes weight. If all but one of the "hollow columns" were only partially enclosed and along the periphery, again, it is difficult to understand how the necessary weight distribution function would be achieved. Thus, the Court interprets the intrinsic evidence of the '111 patent, of which the '662 patent is a continuation, to require that the hollow columns be fully enclosed in the gel media. The Court is not reading limitations from the specifications; the Court is using the whole of the patent to help explain the meaning of terms used in the claims.

Imperial argues that the columns must be straight because a "longitudinal axis" must be straight, not curved. The extrinsic evidence on this issue is quite confusing. The American Heritage Dictionary defines an "axis" as a straight line about which a body or geometric object rotates or may be conceived to rotate. (See Def. Ex. 21.) The American Heritage Dictionary's other definitions of "axis" all connote straight lines. (Id.) Webster's Dictionary defines "axis" as

> a straight line about which a body or a geometric figure rotates or may be supposed to rotate . . . a straight line with respect to which a body or figure is symmetrical—also called the axis of

symmetry . . . a main line of direction, motion, growth, or extension . . . any of three fixed lines of reference in an airplane which usu[ally] pass through the center of mass and are mutually perpendicular and of which the first is the principal longitudinal line in the plane of symmetry . . . called also . . . longitudinal axis.

Webster's Ninth New Collegiate Dictionary 121 (Merriam-Webster Inc. 1987) (emphasis added). It seems clear that "axis" usually connotes a straight line. Not only does the definition of "axis" repeatedly use the words "straight line," but the part of the "axis" definition that specifically references "longitudinal axis" refers to mutually perpendicular lines. It is commonly understood that perpendicular lines are straight. On the other hand, curvilinear coordinate systems exist (as opposed to Cartesian) and it is the Court's understanding that an axis in a curvilinear coordinate system would be curved. Additionally, while the dictionary definition does reference "axis" as a "straight line," some of the definitions just refer to an axis as a "line." Deposition testimony by Pearce that an axis can be curved, (Pl. Ex. 30, Pearce Dep. at 54:24-55:14) supports this. The expert testimony submitted by Jakks states that a longitudinal axis is a centerline of a member, not a rotational axis. (Koffman Decl. ¶¶ 3-5.) The Court views the extrinsic evidence as inconclusive on the meaning of "longitudinal axis."

Focusing, then, on the intrinsic evidence, the Court finds that "longitudinal axis" is used to denote a straight column. First, as Imperial points out, all of the diagrams for the specifications depict straight columns. Thus, it would be consistent with the specifications to read the claim as requiring at least some straight

columns. More convincingly, in the '111 patent, which is incorporated in full into the '662 patent and of which the '662 patent is a continuation, one of the claims clearly uses the term "longitudinal axis" to mean a straight line: "A cushioning element as recited in claim 1, wherein a cross section of one of said columns taken orthogonal to said longitudinal axis of said column has a shape selected from the group consisting of triangular, square . . . ." (Def. Ex 1, '111 patent at 33:13-18.) To take an orthogonal cross section of a longitudinal axis, the longitudinal axis must be straight: "Orthogonal" refers to right angles or perpendicular intersections. Because these patents are closely related, the Court should interpret consistent terms consistently throughout the patents. Because "longitudinal axis" is used to connote a straight line in the '111 patent, the Court construes "longitudinal axis" in the '662 patent also to connote a straight line.

Imperial's New Toys do not have hollow columns because none of the New Toys have multiple columns completely embedded in the gel media. Additionally, most of the New Toys lack more than one straight column. However, the ball and football (Def. Ex. 11) arguably have very short straight columns. Because these straight columns are not embedded in the gel media, however, the straight columns are not "hollow columns" within the meaning of the '662 patent and thus do not infringe the '662 patent.

Claim 1, Issue 4. "At least some of said elongate hollow columns being collapsible either along said longitudinal axis or transverse to said longitudinal axis in order to provide a relief function." (Def. Ex. 3, '662 patent at 5:17-20.) The Court interprets this to mean that the walls of the columns can be compressed, either from top and

bottom or from the sides, yielding to the pressure of the compression.

All of Imperial's toys, including those with hard plastic centers, have columns that are collapsible transverse to the longitudinal axis of the columns. Additionally, the material on all of the toys is sufficiently soft that some "relief" or "give" or "yield" is present when compressed.

Claim 1, Issue 5. "Said relief function including a quantity of said gelatinous elastomer material of the grippable cushion deflecting when the grippable cushion contacts a body part of a user under a sufficient contacting force; said relief function enhancing both grippability and conformability of the grippable cushion." (Def. Ex. 3, '662 patent at 5:21-27.) The Court does not view the "relief function" referenced in this part of the claim to be so dense that its indefiniteness invalidates the claim, as Imperial argues. Instead, the Court understands the relief function to basically be "give" or "yield" such that the material conforms to pressure, making it easier to grip the toys.

As discussed above, all of Imperial's toys have this "relief function."

In conclusion, the Court finds that to infringe the '662 patent, the New Toys would have to have straight, fully enclosed columns. They do not, and thus do not infringe the '662 patent.

3. The '111 and '527 Patents

Imperial's toys do not infringe the '111 or the '527 patent. The New Toys do not infringe because the columns do not buckle. The

Original Balls do not infringe because the columns are not parallel to the compressive force.[8]

Claim 1, Issue 1. Claim 1 of the '111 patent states: "A yieldable cushioning element that includes a flexible, resilient, gel cushioning media . . .; . . . wherein at least one of said column walls is capable of buckling beneath a protuberance that is located on a cushioned object." (Def. Ex. 1, '111 patent at 32:37-64.) The Court interprets the "buckling" described in, *inter alia*, claim 1 of the '111 patent to require a significant distortion of the length of the column wall when pressure is applied to the top of the column. That is, an almost imperceptible yielding to pressure from the top of the column wall would not constitute buckling. The figures and description in the specification support that interpretation. The Court interprets "column" in the same way it interprets "column" in the '662 patent. The Court interprets "longitudinal axis" as it is used in this portion of the '111 patent to simply mean the length of the column. This is also compatible with the drawings and explanations in the specification.

Claim 1 of the '527 patent has identical language to that of the '111 patent. (Def. Ex. 2, '527 patent at 74:6-33.) The Court's interpretation of the relevant language in the '527 patent is the same as its interpretation of the same language in the '111 patent.

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[8] Imperial raised numerous other bases on which the Court could find that its toys did not infringe the '111 or the '527 patent. Because the Court conclusively finds that Imperial's New Toys' columns do not buckle longitudinally and that Imperial's Original Balls do not have columns with longitudinal axes parallel to the direction of the compressive force, the Court need not address the other arguments with respect to noninfringement of the '111 and '527 patents.

Imperial's New Toys do not buckle. The columns in Imperial's New Toys barely yield at all when pressed from the top of the columns. Imperial's New Toys clearly do not infringe the '111 or the '527 patent.

Claim 1, Issue 2. The '111 patent states that "wherein said column's longitudinal axis is located generally parallel to the direction of a compressive force exerted on the cushioning element by a cushioned object in contact with said column top." (Def Ex. 1, '111 patent at 32:58-61.) The '527 patent has practically identical language in its claim 1. (Def. Ex. 2, '527 patent at 74:23-29). Without entering the fray over whether a cylinder can have a top and a bottom, the Court construes this part of the claim to mean that the object must have an orientation and design that is designed to come into contact with compressive force at the ends of the columns.

Imperial's Original Balls do not have a design or orientation that makes the ends of the columns any more likely to hit the ground (or any other compressing/cushioned object) than any other part of the ball. Imperial's Original Balls do not meet this aspect of the '111 and '527 claims and thus do not infringe those patents.

D. Invalidation

Imperial argued in the alternative that the patents should be invalidated based on prior art. Because the Court finds that the patents are not infringed, the Court need not reach the issue of invalidity.

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IV. CONCLUSION

The Court GRANTS summary judgment to Imperial because the gelatinous material used in Imperial's toys does not conform to that required in the patents or, in the alternative, because Imperial's toys do not infringe the structural requirements of the patent claims.

IT SO ORDERED.

DATED: 1/26/06

STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

ENTERED

II. FACTS

This case is about three related patents and two different generations of Imperial toys. Tony Pearce ("Pearce") was the inventor for all three of the patents at issue. Pearce's company (and the owner of the patents) is EdiZONE, LC. Jakks is the licensee of the patents and the manufacturer of the toys that compete with Imperial's toys. Throughout this Order, the Plaintiffs are referred to simply as "Jakks."

Generally speaking, the invention claimed in the patents combine a type of gel with hollow columns. The first two patents, U.S. Patent No. 5,749,111 (issued May 12, 1998) (the "'111 patent") and U.S. Patent No. 6,026,527 (issued Feb. 22, 2000) (the "'527 patent"), were aimed primarily at literal cushions, such as for chairs or couches.[1] The '527 patent was a continuation-in-part of the '111 patent. The third patent, U.S. Patent No. 6,902,662 (issued June 21, 2005) (the "'662 patent"), is aimed at using the same combination of gel and columns in toys, such as footballs, round balls, flying rockets and flying disks. The '662 patent was a continuation-in-part of the '111 and '527 patents.

In late 2003, Imperial began selling a round ball (Def. Ex. 9) and a football (Def. Ex. 10) made of a combination of plasticizer and polymer that had hollow columns running through them (the "Original Balls"). Plasticizer (often a mineral oil) combined in a certain ratio with polymer creates a gel substance. Polymer by itself is

[1] Though it is in dispute as to whether the patents were *limited* to seat cushions, as opposed to also including toys.

inflexible. The more plasticizer added to the polymer, the more flexible and the softer the material becomes.

In March 2005, Jakks sent Imperial a cease and desist letter, contending that the Original Balls infringed the '111 and '527 patents and that they would infringe the '662 patent once it issued. In response to this letter, but without admitting infringement of the '111 and '527 patents, Imperial redesigned its Original Balls, creating what this memorandum calls the "New Toys." The New Toys do not have multiple hollow, enclosed columns running through the gel media. The "hollows" are C-shaped (or grooves) and are on the surface of the ball. The New Toys also have hard plastic cores. The New Toys include round balls (Def. Ex. 11), footballs (Def. Ex. 12), jump ropes (Def. Ex. 15b), spinning tops (Def. Ex. 14), flying disks (Def. Ex. 13), yo-yos (Def. Ex. 16b), and paddle balls (Def. Ex. 15a). The New Toy round ball and football do have one hollow, enclosed column running through their center axes.

Jakks now accuses Imperial's Original Balls and New Toys of infringing all three patents.

III. ANALYSIS

A. Summary Judgment Standard

Rule 56(c) requires summary judgment for the moving party when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Tarin v. County of Los Angeles, 123 F.3d 1259, 1263 (9th Cir. 1997). "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve

the parties' differing versions of the truth." SEC v. Seaboard Corp., 677 F.2d 1301, 1306 (9th Cir. 1982).

The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323-24(1986). That burden may be met by "'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." Id. at 325. Once the moving party has met its initial burden, Rule 56(e) requires the nonmoving party to go beyond the pleadings and identify specific facts that show a genuine issue for trial. See id. at 323-34; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248(1986).

Only genuine disputes—where the evidence is such that a reasonable jury could return a verdict for the nonmoving party—over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. at 248; see also Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 919 (9th Cir. 2001) (the nonmoving party must offer specific evidence from which a reasonable jury could return a verdict in its favor).

B. Rules of Claim Construction

Claim construction is a matter of law. Markman v. Westview Instruments, Inc., 52 F.3d 967, 977-79 (Fed. Cir. 1995). Courts may use intrinsic or extrinsic evidence to interpret the claims, but intrinsic evidence is highly preferred. Vitronics Corp. v. Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed. Cir. 1996). Intrinsic evidence includes the claims, the specifications, and the prosecution history (the record of the inventor's efforts to have the patent

issued). Id. Extrinsic evidence consists of expert testimony, treatises, dictionaries, etc. Markman, 52 F.3d at 980.

The cardinal rule of claim construction is to define the terms of the claim in the way that someone skilled in the art relevant to the patent would define the terms, in light of the context of the entire patent (that is, not just defining the terms or reading the claims in a vacuum). Phillips v. AWH Corp., 415 F.3d 1303, 1313 (Fed. Cir. 2005). To the extent that extrinsic evidence assists the Court in so construing the claims, the Court is encouraged to consult extrinsic evidence. However, extrinsic evidence that contradicts the meaning given a term or claim based on the intrinsic evidence should be disregarded. Vitronics, 90 F.3d at 1583. A term used in a claim may be given a different meaning than that generally ascribed to it by people skilled in the relevant art if that different meaning is presented in the specification of the patent. Id. at 1582. This is known as the inventor or patentee being his own lexicographer. Id. While the specification should not be used to read limitations into the claims that do not exist (for example, reading the specific embodiments to be the only covered embodiments), the specification can be used to better understand and define terms used in the claims. Phillips, 415 F.3d at 1323. The specification is often referred to as the single best source of the meaning of the claims. See Phillips, 415 F.3d at 1320-21; Vitronics, 90 F.3d at 1582.

Courts generally first construe the claims and then apply the construction to the facts of the case (that is, to the allegedly infringing product). To literally infringe a patent, the infringing product must infringe each and every independent claim in the

allegedly infringed patent. See generally Ethicon Endo-Surgery Inc. v. United States Surgical Corp., 149 F.3d 1309, 1315-20.

C. Infringement Analysis

First, Imperial's argument that the material used in its toys is not encompassed within any of the patents will be addressed. Then, Imperial's arguments regarding specific claims within each patent will be discussed. The Court finds that Imperial's toys do not infringe the patents because the material used by Imperial is not within the parameters of the patents; and, in the alternative, that Imperial's toys do not infringe the patents because of various structural claims not met by Imperial's toys.

1. Gelatinous Material

The broad claim of non-infringement made by Imperial is that its toys cannot infringe any of the patents because the material required in all of the patents is more highly plasticized than the material Imperial uses in its toys (that is, the ratio of plasticizer to polymer is higher in the patented inventions than in any of Imperial's toys). "Gel cushioning media" is referenced in the '111 and '527 patents, and "gelatinous elastomer material" is referenced in the '662 patent. The parties seem to agree that "gel cushioning media" and "gelatinous elastomer material" refer to the same concept. Indeed, the '662 patent incorporates the '111 and '527 patents in their entirety and specifically refers the reader to the '111 and '527 patents regarding material. (Def. Ex. 3, '662 patent at 1:57-64.) Also, the '662 patent is a continuation-in-part of both the '111 and the '527 patents.

Imperial argues that the language used in the claims themselves ("yieldable," "flexible") is too indefinite to adequately define the

gel covered by the patents. Without speaking to Imperial's contention that without a more specific definition the "gel" terms are so indefinite as to render the patents invalid, 35 U.S.C. § 112, the Court agrees that the scope of the patents cannot be determined without construing the most basic part of the invention, the material of which it should be comprised. To construe the terms "gel cushioning media" and "gelatinous elastomer material," the Court relies primarily on intrinsic evidence – namely, the specifications of the patents – but also considers extrinsic evidence to bolster its findings with respect to the intrinsic evidence. Imperial proposes the following construction: a material that displays a fluid-like deformation under load, consisting of at least one part plasticizer (e.g., mineral oil) to one part polymer by weight. The Court adopts this definition.

Looking first at the claims: the claims in the '111 patent describe the gel cushioning media as "flexible" and "resilient" and state that the cushioning element (that is, the product made from the gel cushioning media) should be "yieldable as a result of compressability of said cushioning media and bucklability of said column." (Def. Ex. 1, '111 patent at 32:65-67.) Thus, simply based on the wording of the claims of the '111 patent, it seems reasonable to extrapolate that in order to be within the invention, the gel cushioning media would have to be "flexible" enough that properly placed hollow columns would buckle. The difficulty with using this definition without more quantifiable specifications is that the thickness of the column walls would probably affect the bucklability

of the columns. Thus, this definition depends too much on the design of the product rather than the material used.[2]

Looking at the specifications, all of the preferred embodiments of the "gel cushioning media" described by the '111 and '527 patents involve a greater than 3:1 ratio of plasticizer (i.e., mineral oil) to co-polymer (i.e., 75% of the compound by weight is mineral oil).[3] While it is true that the '111 patent specifically states that the "illustrative embodiments . . . are not meant to limit the invention to the particular components and amounts disclosed," (Def. Ex. 1, '111 patent at 24:24-27), the embodiments in the specification are a reasonable place to start in ascertaining what is meant in the claims by "gel cushioning media." The '111 patent also states that different combinations of the ingredients in the preferred embodiments of the gel cushioning media could be appropriate for the invention, including those with less plasticizer than represented in the preferred embodiments. (Def. Ex. 1, '111 patent at 29:48-59.) Jakks argues that one of the gels specifically named as an acceptable material with less plasticizer than the preferred materials (the PVC plastisol gel in United States Patent No. 5,330,249 (issued July 19, 1994)(the "'249 patent")) has less than a 1:1 ratio of plasticizer to polymer (the lower limit proposed by Imperial). A review of the '249 patent demonstrates that Jakks is wrong: the Court's reading (and Imperial's)

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[2] Pearce testified that a gel cushioning media is characterized by "fluid-like deformation under load." (Ex. 6, Pierce Dep. At 83-84.) This statement supports the argument that the material must have a certain characteristic deformation—just a little bit of give or yield is not enough.

[3] The '662 patent does not address materials in its specification section; instead, it refers the reader to the '111 and '527 patents.